circumstances of the person applying for rescission or variation of the order, or of some other good cause.

There was here no evidence whatsoever before the Magistrate of a change in the circumstances of the applicant, the husband. The Magistrate varied the order because the applicant, to quote the Magistrate's words, "must exercise strict economy in his expenditure." This was entirely irrelevant and could not amount to "good cause". As this was the only ground upon which the Magistrate varied the order, the order as varied cannot stand.

Appeal allowed.

Solicitors: *Braddell & Ramani; K. L. Devaser.*

MANLIO VASTA v. INTER-OCEAN SALVAGE & TOWAGE LTD.

[O. C. J. (Tan Ah Tah J.) December 4, 1954]

[Singapore — In Forma Pauperis Suit No. 935 of 1954]

Master and Servant — Failure to provide safe and proper system of work — Defence of common employment.

In this case the plaintiff claimed damages for general injuries and loss of earning power as a result of injuries caused to him in diving operations performed for the defendant company. On the facts the learned Judge found that the defendant company had failed to provide a safe and proper system of work in that they did not provide a second diver on at the scene of operations on the day in question. He also found that they were negligent in that through their agent or agents they were responsible for the unreasonable delay in bringing the plaintiff to the decompression chamber at Loyang after the accident. The defendant company *inter alia* relied on three defences: (1) the plaintiff knowing that diving was a risky occupation voluntarily encumbered such risk i.e. *volenti non fit injuria;* (2) the plaintiff was guilty of contributory negligence; (3) the doctrine of common employment.

Held: (1) the plaintiff did not voluntarily undertake or contract to accept the risk upon himself of diving without a second diver and therefore the defence of *volenti non fit injuria* was not available to the defendant company; (2) on the facts the plaintiff was not guilty of contributory negligence; (3) where the employer, as in this case, had not provided a safe and proper system of work for his employee the employer cannot rely on the doctrine of common employment as a defence.

Case referred to:—

(1) *Winter v. Cardiff Rural District Council* (1950) 1 All E.R. 819.

CLAIM for damages.

K. E. Hilborne for the plaintiff.

H. G. Hanbury Sparrow for the defendants.

Cur. Adv. Vult.

Tan Ah Tah J.: — In this case the plaintiff was employed by the defendant company as a diver to work on their salvage and wreck raising operations. On the 12th August 1953 in the course of his work the plaintiff was diving during certain salvage operations off the coast of Singapore at an approximate depth of 120 feet. During the last of a series of dives the plaintiff felt giddy and gave the signal to the linesman on the company's boat to be brought up to the surface. He was thereupon hauled up in one movement in a short space of time instead of by stages over a period of time to allow for decompression in the body. As a result of the events that ensued the plaintiff sustained a form of compressed air illness generally referred to by divers and persons engaged in salvage operations as the "bends." There was a delay in transporting the plaintiff to Loyang for treatment in a decompression chamber which was available there and in consequence of this delay the plaintiff sustained grave personal injuries some of which have been stated by medical witnesses to be of a permanent character.

Among other allegations, it is alleged on behalf of the plaintiff that the defendant company failed to provide and maintain a safe and proper system of work, one of the requirements in a safe and proper system of work being the presence of a second or assistant diver to assist the person actually diving in the event of an emergency arising. On this point Mr. McCracken, Port Diving Officer, Singapore gave evidence as an expert witness and was most emphatic in his assertion that the presence of a second or assistant diver was essential during diving operations. The following is a passage from his evidence:—

"A diver should not dive without a second diver on the surface. I am most positive about this. Even at 50 feet I would still have a stand-by diver. This is a Navy rule. If a diver gets into difficulties he can always signal the surface that he is in difficulties and the second diver can go to his assistance."

It was submitted by counsel for the defendant company that the Royal Navy was over-cautious in prescribing the rules relating to the necessity of a second diver. On this question it is to be observed that the International Salvage Association (Malaya) Ltd., a commercial concern which has been carrying out salvage operations in local waters since 1952, has always employed a minimum of two divers as a safety measure. Mr. Wong Wing Cheung, who described himself as an executive director of this company, gave the following evidence on this point:—

"My company has been carrying out salvage operations in local waters since 1952. So far we have never attempted any salvage operations with less than two divers. We always have a minimum of two divers as a safety measure. It is a rule or regulation laid down by my company. My company is a purely civilian company, not attached to the Services."

I accepted the evidence of Mr. Wong Wing Cheung as being the truth and I also accepted the evidence of Mr. McCracken as an expert witness.

Captain Doust, the managing director of the defendant company, stated in examination-in-chief that a second diver was not necessary but admitted in cross-examination that in exceptional cases, e.g. in a case where the person actually diving was suffering from extreme exhaustion, it might be necessary to send a second diver down to assist him.

On this part of the case I am satisfied and find as a fact that the defendant company failed to provide or maintain a safe and proper system of work at the relevant period. If a second diver had been present on the company's boat on 12th August 1953 he could have assisted the plaintiff in various ways. In an attempt to recompress his body the plaintiff had gone back into the water by himself but owing to a feeling that he was going to vomit he was unable to descend further than 30 feet and had to come to the surface again. A second diver, if he had been there, could have waited for a favourable opportunity to assist the plaintiff to go under the water when the plaintiff felt well enough to attempt another descent and would have rendered invaluable assistance in many ways to the plaintiff in his efforts to recompress his body. I accept the evidence of the plaintiff when he says that on the way back to shore in the company's boat he asked the crew to let him down under the water and they did not do so. If a second diver had been there he could have assisted the plaintiff to go down to the required depth in order to recompress his body.

The first remedy available to the plaintiff on 12th August 1953 was that of going under water to the required depth; the second remedy was to be placed in the decompression chamber. Owing to the absence of a second diver the plaintiff was deprived of the opportunity of availing himself of the first remedy and had to depend on the second remedy. In my opinion the defendant company was negligent in not providing a second diver on the company's boat on 12th August 1953.

I now turn to the second remedy and to a consideration of the efforts made by the defendant company and its agents to bring the plaintiff to the decompression chamber at Loyang. Now Dr. Wells, Mr. McCracken and Sir Robert Davies in his book "Deep Diving" are unanimous in saying that speed in transporting a person suffering from compressed air illness to a decompression chamber is absolutely essential. This is an obvious fact and does not require to be elaborated.

After the plaintiff had been taken to Prince Edward Wharf Mr. Linus Suen, who was in charge of the company's boat, telephoned to Captain Doust some time between 1.45 p.m and 2 p.m. to inform him of what had happened. According to Captain Doust he at once left his office and went to Prince Edward Wharf arriving there a few minutes before 2 p.m. He instructed the company's boat to proceed to Clifford Pier and then returned to his office to telephone for the ambulance. After making several telephone calls in an effort to obtain an ambulance, including one to the Singapore Harbour Board, he telephoned to Commander Derek Williams at Loyang at 2.10 p.m. and informed him that he was bringing the plaintiff to the decompression chamber. He then proceeded to Clifford Pier arriving there at about 2.15 p.m. and in any event before 2.30 p.m. There he waited for the ambulance which did not arrive until 3.15 p.m. Eventually the plaintiff was taken to Loyang in the ambulance, arriving there at 4.30 p.m.

When Captain Doust was asked in cross-examination why he did not find other ways and means of conveying the plaintiff to Loyang he gave the following answers :—

> "I realised he (i.e. the plaintiff) was a stretcher case. He had no broken bones. It was difficult enough to get him on the stretcher. The boat was ranging up and down and it would have been unsafe to get him out without a stretcher. It was difficult but not impossible. There was a crew of four and myself. Bystanders could have helped. If I had done that (i.e. used another form of transport) the plaintiff would have been at Loyang a long time before 4.30 p.m."

Now Captain Doust is a person of great experience in diving and salvage operations having been concerned with such matters for 35 years. He has stated that he knew the plaintiff was suffering from an attack of the bends and that speed was absolutely essential in transporting him to a decompression chamber. In a situation where every minute was precious I consider that Captain Doust should not have waited for the ambulance, as he did for three quarters of an hour, but should have called in the assistance of the crew of his company's boat and bystanders and caused the plaintiff to be placed in a lorry or other suitable form of transport and taken to Loyang forthwith. In a place like Clifford Pier it could not have been difficult to hire or borrow the use of some form of transport. In my opinion Captain Doust was clearly negligent on the afternoon of 12th August 1953 particularly in waiting for the ambulance and not taking measures similar to the one I have outlined above. There was every chance that the personal injuries sustained by the plaintiff would have been prevented if Captain Doust had acted with greater promptitude on that day. As it was, the delay in providing the necessary treatment resulted in the present condition of the plaintiff. In my opinion the defendant company were negligent in that through their agent or agents they were responsible for the

unreasonable delay in bringing the plaintiff to the decompression chamber at Loyang.

The defandant company relied *inter alia* on three defences which may be conveniently summarised under the following headings :—

(1) That the plaintiff knowing that diving was a risky occupation voluntarily encountered such risk i.e. *volenti non fit injuria.*
(2) That the plaintiff was guilty of contributory negligence.
(3) The doctrine of common employment.

In my opinion the plaintiff did not willingly accept the position that he was not to have a second or assistant diver. I accept his evidence that he asked Captain Doust to employ a second diver and that the latter failed to do so. It is to be observed that when the plaintiff was diving in salvage operations before 12th August 1933 he was accom panied by another diver called Basil Chai. It was because Basil Chai had met with an accident that the plaintiff had to dive without a second diver on 12th August 1953. I find that the plaintiff did not voluntarily undertake or contract to accept the risk upon himself of diving without a second diver. In my opinion the defence of *volenti non fit injuria* does not avail the defendant company as it does not apply in this case.

With regard to the defence of contributory negligence I find that the plaintiff did not eat any solid food after coming up from the last dive as alleged by the defendant company. He was hauled up by the linesman within a short space of time at his own request. At that stage, apart from the default of the defendant company in failing to provide a second diver, no one was to blame for anything that had happened. It was the failure to provide the plaintiff with a chance to avail himself of either of the two remedies which gave rise to the eventual disaster. In the case of the second remedy it is true that the plaintiff was eventually placed in the decompression chamber but that was done too late to cure him of the compressed air illness. I find as a fact that the plaintiff was not guilty of contributory negligence.

As to the doctrine of common employment there is a line of cases which has laid it down that where an employer has not provided a safe and proper system of work for his employee the employer cannot rely on the doctrine of common employment as a defence. This is clearly laid down in *Winter v. Cardiff Rural District Council*[1]. In view of my finding that the defendant company failed to provide a safe and proper system of work at the relevant period the doctrine of common employment does not in my opinion avail the defendant company as a defence.

In the result, for the reasons which I have endeavoured to indicate above, I find that the plaintiff sustained his injuries as a direct consequence of the negligence of the defendant company and that the said injuries were solely caused by the negligence of the defendant company.

I now turn to the question of damages. The plaintiff has given evidence regarding his age, previous earnings and conditions of service, while his physical condition has been described in detail by Dr. Wells, Professor Ransome and the plaintiff himself; any attempt to summarise their evidence may result in inaccuracy and as it already forms part of the record I will not try to do so. Taking all the circumstances into consideration I assess damages under the head of pain and suffering at $3,000, under the head of loss of future earnings at $20,000, and under the head of the disadvantage arising from disablement apart from loss of earning power at $10,000.

After hearing counsel on the question of special damage I award to the plaintiff the sum of $5,600 which is the amount agreed by counsel to be due to the plaintiff by way of special damage. There will be judgment accordingly for the plaintiff for the sum of $38,600.

Finally, counsel having been heard on the question of costs I make no order as to costs.

Judgment for the plaintiff.

Solicitors : *Hilborne & Murphy; Drew & Napier.*

CHOO SAI BOEY (m.w.) v. REGINA

[A. Cr. J. (Murray-Aynsley C.J.) November 26, 1954]

[Singapore — Magistrate's Appeal No. 181 of 1954]

Liquors Revenue Ordinance (S.S. Cap. 225), ss. 69 & 83 — Forfeiture of car — Analyst's certificate — Jurisdiction of Magistrate's Court.

This appeal arose from the decision on an inquiry under s. 83(3) of the Liquors Revenue Ordinance regarding the disposal of a motor car which was seized by a Customs Party on May 21, 1954. At about 9.10 p.m. on that day the car in question appeared on the scene and stopped at a shop at Spottiswoode Park. A male Chinese alighted from the car and went to the rear and opened the luggage boot of the car. Just then the Customs Party which lay in wait nearby came out of hiding and the male Chinese together with another Chinese who came out from the front seat of the car bolted. The Revenue Officers gave chase but failed to apprehend the persons. In the luggage boot of the car were found 14 one gallon tins of samsu. The car and samsu were seized and the seizure was reported to the Court under s. 83(3) of the Liquors Revenue Ordinance. The appellant in response to the notice inviting claims against the article seized claimed the car and she was ordered to show cause as to why an order of forfeiture should not be made in respect of the said car.